STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 11, 2000
v	No. 215427 Calhoun Circuit Court
JEFFREY SCOTT WILLIAMS, Defendant-Appellant.	LC No. 98-001748-FH

Before: Gage, P.J., and Gribbs and Sawyer, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and resisting and obstructing a police officer, MCL 750.479; MSA 28.747. Defendant appeals as of right. We affirm.

Defendant's conviction arose from his arrest by the Battle Creek Police Department on outstanding warrants. During the course of the arrest, defendant attempted to flee from the arresting officers. While chasing defendant, one of the officers observed him drop an object resembling a plastic bag. Once they apprehended defendant, the officers discovered the dropped bag, which the police later determined contained approximately eleven grams of crack cocaine. The officers also searched defendant and discovered approximately $1,600, including at least forty $20 bills.

On the first day of trial, defendant informed the trial court that he had negotiated a plea agreement whereby he agreed to plead guilty to a lesser felony with a maximum sentence of four years. The trial court refused to accept the plea based on its policy of not accepting pleas once trial has begun. Defendant later moved for a mistrial due to the court's refusal to accept the plea; however, the court denied this motion.

During his case-in-chief, the prosecution sought to qualify Officer Austin Simons as an expert in drug trafficking. The trial court found that Simons was qualified to testify and that the testimony would aid the jury, and allowed the evidence over defendant's objection. Simons testified regarding the nature and significance of the cocaine in defendant's possession. Simons also testified regarding the

significance of the money found on defendant, stating that defendant's possession of the money suggested that he was a drug dealer.

Defendant argues that the trial court abused its discretion when it refused to accept defendant's plea agreement. We disagree. It is well established that trial courts have the discretion to accept or reject plea agreements. *People v Bryant*, 129 Mich App 574, 577; 342 NW2d 86 (1983); *People v Linscott*, 14 Mich App 334, 340; 165 NW2d 514 (1968). Defendant does not dispute that the court has the discretion to reject his plea. Rather, he argues that the court does not have the discretion to reject his plea for the sole reason that it was offered after trial began.

In *People v Grove*, 455 Mich 439; 566 NW2d 547 (1997), our Supreme Court stated that a trial court is under no obligation to consider a plea agreement, and may reject it, even without articulating the reasons for doing so. *Id*. at 462. The Court further held that criminal defendants have no fundamental right to acceptance of a guilty plea, and the trial court may reject the plea in the exercise of sound judicial discretion. *Id*. at 439; *Santobello v New York*, 404 US 257, 262; 92 S Ct 495; 30 L Ed 2d 427 (1971). It is within the court's discretion to reject a plea agreement based on considerations of public interest and proper administration of justice. *People v Wright*, 99 Mich App 801; 298 NW2d 857 (1980); *People v Matulonis*, 60 Mich App 143, 148-149; 230 NW2d 347 (1975).

We have upheld the rejection of a plea agreement where the trial court based its decision on public interest and judicial economy. In *Wright*, *supra*, we affirmed the trial court's refusal to accept a plea bargain mid-trial. In stating its reasons for rejecting the plea agreement, the trial court in *Wright* noted, among other considerations, the fact that the defendants had shown no desire to cooperate prior to trial and the fact that the trial was already underway. *Id*. at 822. In *People v Austin*, 209 Mich App 564; 531 NW2d 811 (1995), we affirmed a trial court's decision to reject a plea agreement where it was offered one day before trial and well after the cut-off date for pleas. We noted that the trial court's decision enhanced its docket control and eliminated unjustifiable expense and delay, and was, therefore, proper. *Id*. at 567. Under the holding of *Austin*, which was upheld by the Supreme Court in *Grove*, *supra*, judicial economy and docket control are proper considerations in determining whether to accept or reject a plea.

Defendant seeks to distinguish this case from the facts of *Austin* in that no plea cut-off date was established in this case. Regardless whether the facts of the present case differ from the facts of *Austin*, nowhere in the *Austin* or *Grove* decisions does it state that rejecting a guilty plea due to lateness alone is an abuse of discretion. In fact, the language of *Austin* upholds the propriety of the trial court's consideration of docket control and conserving judicial resources. *Austin*, *supra* at 567.

Defendant cites *United States v Moore*, 916 F2d 1131 (CA 6, 1990), as support for the proposition that rejecting a guilty plea only because it was offered at trial is an abuse of the court's discretion, noting that the Supreme Court in *Grove* distinguished *Moore*. *Grove*, *supra* at 465 n 31. However, defendant misinterprets the holding of *Moore*. The Sixth Circuit in *Moore* criticized the trial court's rejection of a plea agreement because the court did not state its reasons for doing so and remanded the case so that the district court could state on the record the reason for rejecting the plea. *Moore*, *supra* at 1136. In a footnote, the court speculated, based on the assertions of the parties, that

the district court rejected the plea because it came on the eve of trial. *Id*. at 1136 n 11. Contrary to defendant's argument, the court in *Moore* specifically stated that the remand was not intended to mean that rejecting a plea because it comes too late is not a proper exercise of discretion.

In the present case, the trial court's rejection of the plea was not arbitrary, but based on a sound policy promoting judicial economy and docket control. Any suggestion that the trial court interfered with the prosecutor's charging authority is diminished by the fact that the prosecutor did not object to the court's rejection of the plea. The trial court acted within its sound judicial discretion in rejecting defendant's plea and proceeding with trial.

Defendant also argues that the trial court erred when it allowed Officer Simons to testify as an expert and that Simons' testimony constituted impermissible drug profiling evidence. We review the court's decision to admit evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669; 550 NW2d 568 (1996); *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Drug profiling evidence has been defined as evidence of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity. *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995). Drug profiling characteristics are behaviors that are generally innocuous and that are not criminal in and of themselves, such as carrying a pager or possessing large sums of cash. *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999). Although such evidence may be admissible to explain seemingly innocent characteristics to the jury, it is inadmissible as substantive evidence of a defendant's guilt. *Hubbard*, *supra* at 241. Prosecutors may introduce expert testimony to explain the significance of circumstantial evidence in controlled substance cases, however. *People v Ray*, 191 Mich App 706, 707-708; 479 NW2d 1 (1991).

As we recognized in *Murray*, *supra*, it is difficult to separate inadmissible drug profiling used as substantive evidence of guilt from admissible expert testimony that merely serves as an explanation of circumstantial evidence. *Id*. at 54-55. We cited several factors that aid in determining the admissibility of the evidence: (1) the reason for the admission must be only to assist the jury as a background explanation, (2) the profile without more should not enable the jury to infer the defendant's guilt, (3) the court must make clear what is and what is not appropriate use of the evidence, and (4) the expert witness should not express an opinion on the defendant's guilt. *Id*. at 56-57.

Defendant first objected to Simons testifying as an expert based both on his qualifications and on whether "drug trafficking" is a field of expertise. A witness may offer opinion testimony as an expert if the trial court determines that specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue. MRE 702; *Ray*, *supra* at 707. Here, the trial court properly determined that Simons was qualified to offer opinions regarding the characteristics and nature of drug dealing. Simons testified that he participated in fifty to sixty drug buys as an undercover officer for the special investigations unit. He further testified that he underwent two weeks of training for this duty. Also, Simons testified about his knowledge of crack cocaine and the nature of crack cocaine dealing. Because Simons appears very knowledgeable on the subject of crack cocaine and this was knowledge and experience that could aid a lay juror in deciding the issues of this case, the court did not abuse its discretion in allowing Simons to testify as an expert.

Defendant further objects to the specific testimony given by Simons, arguing that his testimony constitutes impermissible drug profiling. Simons testified at length about the characteristics of crack cocaine and crack dealers, and about the significance of the amount and the characteristics of the cocaine found in the plastic bag dropped by defendant as he was apprehended by the police. He also testified about the significance of the money that was found on defendant when arrested. We find that this evidence was admissible because it did not meet the definition of drug profiling. Possession of cocaine hardly qualifies as an innocuous activity. *Murray*, *supra* at 65. The trial court properly allowed Simons to enlighten the jurors regarding the significance of the amount of cocaine defendant possessed. *Ray*, *supra* at 707-708. The fact that the witness offered his opinion that defendant was a dealer is not impermissible either because experts are allowed to testify about an ultimate issue. MRE 704; *Id*. at 707. There was no abuse of discretion in allowing Simons to testify regarding drugs possessed by defendant or the significance of the money found on defendant at the time of his arrest. We further hold that even if the evidence was improperly admitted, it was harmless error.

An error in the admission of evidence should not result in setting aside a verdict unless refusal to do so appears inconsistent with substantial justice or would result in a miscarriage of justice. MCR 2.613(A); MCL 769.26; MSA 28.1096. Defendant does not argue that the error implicates a constitutional right; therefore, the proper inquiry is whether, after an examination of the entire case, it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Viewing the evidence as a whole, we find that the jury had sufficient evidence to infer defendant's possession of cocaine with intent to deliver, notwithstanding the inadmissible testimony. The prosecution introduced evidence that defendant possessed more than eleven grams of crack cocaine, which is fifty to one hundred times the amount typically possessed by users. Evidence was also introduced that each of defendant's four rocks of crack was substantially larger than the normal pea sized, one tenth of a gram rock. Finally, evidence was presented that the sheer amount of crack cocaine suggested that defendant was dealing. Because a reasonable trier of fact could have returned a verdict of guilty even in the absence of the prejudicial drug profiling evidence, it is more probable than not that the error did not affect the outcome. Hence, the error is harmless.

Affirmed.

/s/ Hilda R. Gage
/s/ Roman S. Gribbs
/s/ David H. Sawyer